

IN THE SUPREME COURT OF THE STATE OF MISSOURI

In the Interest of

R. B.

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) Appeal No. SC86979
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APPELLANT’S AMENDED BRIEF

Dated January 6, 2006

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STATEMENT OF JURISDICTION

This matter involves an appeal from the portion of the Findings, Recommendation and Judgment Denying Jurisdiction of the Honorable Elizabeth W. Swann, Commissioner of the Family Court, 11th Judicial Circuit suppressing an audio and video recording in a delinquency case. The audio and video recording was made during the forensic interview portion of a child victim which occurred as part of the Saint Charles County's Child Advocacy Center process. The Court suppressed the evidence as a violation of the juvenile's Sixth Amendment right to confrontation, holding that the United State Supreme Court decision in *Crawford v. Washington*, 124 S. Ct 1354 (2004), prohibited the admission into evidence of the video. Appellant has challenged the suppression of this evidence pursuant to Section 211.261.2 R.S. Mo. This case involves the validity of several statutes as violations of the constitutional right to confrontation contained in both the United States and Missouri Constitutions, as generally applicable to proceedings under the Juvenile Code and as specifically applicable to Section 491.075 RSMo and 492.304 R.S. Mo This Court therefore has jurisdiction.

STATEMENT OF FACTS

A petition was filed by Appellant against Respondent under Cause JU104-283J (LF 3) alleging two counts of delinquency, one count of child molestation in the first degree, an act which if committed by an adult would constitute a class B felony, and one count of sexual misconduct involving a child, an act which if committed by an adult would constitute a class D felony. On October 26th, 2004, the cause came before the trial court for an adjudication hearing.

At trial the Juvenile Officer called the victim, A.G., to the stand. A.G. was sworn and asked preliminary questions such as her name and address. (LF 7, TR 4) She was able to answer these preliminary questions. She was also able to identify the juvenile (TR 4-5). She was able to testify that something happened on or about November-December 2004. (TR 5). After that, A.G. started to cry and it soon became apparent that she would be unable to continue to testify. Counsel for the Juvenile Officer asked that A.G. be declared unavailable and the trial court so found.(TR 5) The counsel for the juvenile was unable to cross-examine A.G. although he requested to do so. (LF 7, TR 6)

The Juvenile Officer called the forensic examiner from the Child Advocacy Center in Wentzville, Missouri. This witness had performed a forensic exam of A.G. and had videotaped the interview that took place as part of their examination procedures. (TR 8-10). The counsel for the juvenile had viewed the video before the trial and was fully aware of its

contents and the fact that the Juvenile Officer would be seeking its admission at trial.

The forensic interview has the following protocol. No person is present in the interview room except the examiner and victim; however, there are law enforcement officials and representatives of the Juvenile Office in an adjoining room. These people can view the interview as it is taking place through a television monitor and a one-way window that looks into the interview room. Both audio and video are heard and recorded and there is a microphone whereby these people can ask questions directly of the examiner, who has an ear plug receiver. The questions asked cannot be heard by the victim and the examiner is free to disregard them at his or her discretion. The forensic examiner testified to this protocol and further testified that it was utilized in the examination of A.G. (TR 8-10).

Counsel for the Juvenile Officer next called the Investigating Officer, Detective Jason Tillot, to testify. Detective Tillot testified as to the course of his investigation as well as his seizure of the videotape of the forensic interview of the child victim. (TR 11-15).

Counsel for the Juvenile Officer asked that the videotape be entered into evidence. (TR 15). Counsel for the juvenile objected on the grounds that the holding of the U.S. Supreme Court in the case of *Crawford v. Washington*, 124 S. Ct 1354 (2004), prohibited the admission into evidence of the video as a violation of the juvenile's Sixth Amendment right to confrontation. The trial court overruled the counsel for the juvenile's objection and received the videotape into evidence. (TR 15). Additional evidence was adduced and the case was submitted.

The trial court took the case under advisement. (LF 6, TR 59) On November 29, 2004, the trial court issued its Findings, Recommendations and Judgment Denying Jurisdiction wherein the court suppressed the videotape after receiving it into evidence (LF 6-9) and this appeal followed.

POINTS RELIED ON

I. The standard of review

State v. Bibb, 922 S.W.2d 798, 802 (Mo.App.E.D. 1996)

State v. Franklin, 841 S.W.2d 639, 641 (Mo. 1992)

State v. Stevens, 845 S.W.2d 124, 128 (Mo.App.E.D. 1993)

State v. Shaon, 145 S.W.3d 499 (Mo. App., W.D.2004)

II. The trial court erred in declaring that Section 491.075 RSMo was unconstitutional in that application of the test dictated by the United States Supreme Court to determine whether proceedings are civil or criminal in nature clearly demonstrates that juvenile proceedings in Missouri are statutory civil proceedings.

In Re Gault, 387 U.S. 1; 87 S. Ct. 1428; 18 L. Ed. 2d 527; 1967 U.S (1967)

United States v. Ward, , 248 (U.S. 1980)

Allen V. Illinois 478 U.S. 364; 106 S. Ct. 2988; 92 L. Ed. 2d 296; 1986 U.S.

In the Interest of RLC, 967 S.W.2d 674, 677 (Mo. Ct. App. 1998)

- III. The Crawford rule should not be applied to statutorily civil juvenile delinquency proceedings in that it is not required and the statutory procedures which permit the admissibility of the type of evidence suppressed in this case are sufficient to insure reliability in a judge tried case.**

In Interest of C.K.G., 827 S.W.2d 760, 767 (Mo. Ct. App., 1992)

Crawford v. Washington, 124 S. Ct 1354 (2004)

Section 492.304 R.S. Mo

Section 491.075 R.S. Mo

- IV. Assuming *arguendo* that the right to confrontation was violated, the trial court erred in suppressing the video as unconstitutional in that other remedies were available that would avoid a constitutional challenge.**

Section 490.680 R.S. Mo.

Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281, 284

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- V. The trial court erred in suppressing the videotape in its Findings and Recommendations Denying Jurisdiction after admitting it into evidence at trial as such a procedure deprives Appellant of a full and fair hearing.**

Black's Law Dictionary Abridged Fifth Edition,

ARGUMENT

I. The standard of review

Ordinarily, when reviewing a trial court's order suppressing evidence, the appellate court should consider the facts and reasonable inferences favorably to the order challenged on appeal. *State v. Bibb*, 922 S.W.2d 798, 802 (Mo.App.E.D. 1996). If neither party disputes the facts, whether the trial court was correct in its ruling must be "measured solely by whether the evidence is sufficient to sustain the findings." *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. 1992). However, as this is an order based upon an alleged violation of the Sixth Amendment to the Constitution of the United States, it is respectfully submitted that the Court should consider the ruling in light of the proper application of the precepts of that Amendment. *State v. Stevens*, 845 S.W.2d 124, 128 (Mo.App.E.D. 1993); *State v. Taylor*, 965 S.W.2d 257, 260-261 (Mo. Ct. App., 1998) and the issue of whether the Amendment was violated is a question of law which is reviewed *de novo*. *State v. Shaon*, 145 S.W.3d 499 (Mo. App., W.D.2004)

II. The trial court erred in declaring that Section 491.075 RSMo was unconstitutional in that application of the test dictated by the United States Supreme Court to determine whether proceedings are civil or criminal in nature clearly demonstrates that juvenile proceedings in Missouri are statutory civil proceedings.

This appears to be a case of first impression. The issue in this case is whether there is any difference between juvenile delinquency proceedings and criminal proceedings and, if there are differences, does the strict and narrow Crawford rule (hereinafter the Crawford Rule) enunciated in Crawford v. Washington, 124 S. Ct 1354 (2004) apply.

The holding in Crawford stands for the proposition that testimonial out-of-court statements of an unavailable witness are inadmissible as a violation of the Sixth Amendment right to confrontation unless there has been a prior opportunity to cross-examine the witness. By its very language, as well as the facts and analysis of the Court, Crawford clearly only applies to criminal proceedings “the *Sixth Amendment's* guarantee that, “[i]n **all criminal prosecutions**, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Nowhere in Crawford does it specify that its application must be applied to juvenile proceedings. It is only

through the case of *In Re Gault*, 387 U.S. 1; 87 S. Ct. 1428; 18 L. Ed. 2d 527; 1967 U.S (1967) that the trial court has found Crawford applicable.

The Gault Decision

Gault was decided on due process grounds. The Court held that the constitutional protections of notice and opportunity to be heard were fundamentally lacking in juvenile delinquency proceedings and must be afforded juveniles. The Court further held that although juvenile delinquency proceedings were considered civil, the constitutional protections associated with criminal proceedings such as the right to counsel, the privilege against self-incrimination and the right to confrontation were also applicable to juvenile delinquency proceedings through the Fourteenth Amendment.

A reading of *Gault*, shows that it was the potential loss of liberty by a commitment to a “state institution” upon which the United States Supreme Court rested its decision. “...juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal"..." *Gault at 49*. The Court believed that the traditional appellation of juvenile court proceedings as civil masked the true

purpose of juvenile delinquency proceedings which was to punish the juvenile rather than to treat him. “The Court in Gault was obviously persuaded that the State intended to punish its juvenile offenders, observing that in many States juveniles may be placed in "adult penal institutions" for conduct that if committed by an adult would be a crime.” Allen v. Illinois, 78 U.S. 364, 373 (U.S. 1986) The Court felt that States could not protect juvenile delinquency proceedings from constitutional infirmity by the use of a mere label. “To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States juveniles may be placed in or transferred to adult penal institutions after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil.”” Id. With respect to the Sixth Amendment’s confrontation clause application, the statement that the Court made is that “absent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to **the opportunity for cross-examination in**

accordance with our law and constitutional requirements. *Id at 57.* It did not elaborate as to what those laws and constitutional requirements were.

Since that time the Supreme Court of the United States has set forth a two part test to determine whether proceedings are considered to be criminal or civil.

The test used by the U.S. Supreme Court to determine whether a statute is civil or criminal for constitutional purposes requires a two step inquiry.

“[T]he question whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.” *United States v. Ward*, 248 (U.S. 1980). The Court in *Ward* set out a two part test to be followed in making this determination. The first part of the test is to determine whether the Legislature, in establishing the statutory scheme, indicated either expressly or impliedly a preference for one label or the other. The second part requires a further inquiry of whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. “[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.” *Id at 249*

In applying the second prong of the test, it is important to recognize that the “loss of liberty does not ipso facto mean that the proceeding is a ‘criminal prosecution’ for purposes of the Sixth Amendment.” *Middendorf v. Henry*, 425 U.S. 25, 37 (U.S. 1976). In *Allen V. Illinois* 478 U.S. 364; 106 S. Ct. 2988; 92 L. Ed. 2d 296, (1986) the Supreme Court stated that “*Gault’s* sweeping statement that “our Constitution guarantees that no person shall be ‘compelled’ to be a witness against himself when he is threatened with deprivation of his liberty,” supra at 50, is plainly not good law”. In that case, the United States Supreme Court was deciding the constitutionality of a sexual predator commitment law. The Court, using the *Ward* analysis, held that even though a person may be confined for an indefinite period of time, a clear “loss of liberty”, the statute was constitutional since the legislative purpose was treatment rather than punishment. In so deciding, the Court looked at the entire statutory scheme in question. The Court found that “the State has disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed persons may be released after the briefest time in confinement. The Act thus does not appear to promote either of “the traditional aims of punishment—retribution and deterrence”” *Id at 370* . The Court also found that the institution to which these people were committed

was “expressly designed” to provide the appropriate level and type of care and treatment that was needed. It also found that “the fact that [the institution] is apparently a maximum-security facility [does not] affect our analysis: “The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable... to care for themselves; the state also has authority under its police power to protect the community...” **Id at 373.** Based upon this analysis, the Court upheld the commitment process.

It is important to note that the **Ward** test was implicitly overruled by the case of **United States v. Halper**, 490 U.S. 435, 448 (U.S. 1989). In that case, the test to determine whether or not a statute was civil or criminal was replaced with the standard that imposition of "punishment" of any kind triggered criminal constitutional protections and the determination of what constituted "punishment" depended primarily on whether it served the traditional "goals of punishment," namely "retribution and deterrence." Any sanction that was so "overwhelmingly disproportionate" to the injury caused that it could not "fairly be said *solely* to serve [the] remedial purpose"" was deemed to be punishment and triggered the application of criminal constitutional rights and privileges. However, the United States Supreme Court subsequently and unequivocally disavowed “the method of analysis

used in *United States v. Halper*, 490 U.S. 435, 448, 104 L. Ed. 2d 487, 109 S. Ct. 1892 (1989), and reaffirm[ed] the previously established rule exemplified in *United States v. Ward*, 448 U.S. 242, 248-249, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980).” *Hudson v. United States*, 522 U.S. 93, 96 (U.S. 1997)

It is respectfully suggested that the Court in *Gault* imposed the application of the Sixth Amendment right to confrontation upon juvenile delinquency proceedings using just the type of analysis that was disavowed by the Court in *Hudson*. The *Gault* Court looked at the punishment rather than the purpose of juvenile delinquency proceedings and, based solely on the possibility of a juvenile’s liberty becoming restricted, ignored the legislative intent to establish civil proceedings and rested its analysis upon its findings that “commitment to a state institution” is the equivalent of criminal incarceration. It did not give proper deference to legislative intent nor did it look at the entire statutory scheme to determine whether such potential loss of liberty to a juvenile delinquent was “...so punitive either in purpose or effect as to negate that intention.” It is respectfully suggested that the proper analysis that must be utilized is the *Ward* test and that application of this test clearly demonstrates that juvenile delinquency proceedings are

civil, not criminal, proceedings, despite the potential loss of liberty that may occur by “commitment to a state institution”.

Application of the Ward test to the Missouri Juvenile Code clearly demonstrates a legislative intent to establish civil proceedings and the potential loss of liberty involved in commitment to the Division of Youth Services is not so punitive either in purpose or effect as to negate that intention.

Applying the first prong of the Ward test to the Missouri Juvenile Code, the Legislature has declared “The practice and procedure customary in proceedings in equity shall govern all proceedings in the juvenile court...” Section 211.171 R.S.Mo. Rule 110.04 of the Rules of Practice and Procedure in Juvenile Courts reiterates this declaration and references the rules of Missouri Civil Procedure in determining what procedure to follow where no specific juvenile court rules exist. Proceedings in equity have been and still are considered civil in nature whose purpose is to achieve fundamental fairness that a strict application of the law might otherwise prevent.

Section 211.011 RSMo sets forth the purpose of the Juvenile Code. It states: “The purpose of this chapter is to **facilitate the care, protection and discipline** of children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, **to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state**, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them. **The child welfare policy of this state is what is in the best interests of the child.**” (Emphasis added)

The “commitment to a state institution”, which so concerned the Court in *Gault*, is, under Missouri law, commitment to the Missouri of Division of Youth Services (hereinafter “DYS”). The purpose and procedure required for commitment is controlled by Chapter 219 RSMo. Section 219.016.1 states “The division is responsible within the terms of sections 219.011 to 219.086, for the prevention and control of juvenile delinquency and the rehabilitation of children.” Section 2 sub.(1) of the same statute states that **DYS** must provide “for the reception, classification, care, activities, education and rehabilitation of all children committed to the

division”. By the plain language of both the Juvenile Code and Chapter 219 it is clear that the Legislature intended to create a civil statutory procedure for treating and rehabilitating delinquent juveniles.

The second prong of the **Ward** test is also satisfied. A commitment to DYS is only available when a court of competent jurisdiction “determines a suitable community-based treatment service does not exist, or has proven ineffective”. DYS must develop a treatment plan that is to be reviewed by the committing Court. A juvenile may not be kept in DYS care beyond the age of 18 unless DYS gets permission to continue treatment by petition to the committing court in which case he must be discharged by age twenty one. Section 219.021.1 R.S.Mo.

Section 219.071 states “No child committed to the division and awaiting transfer to the custody of the division or who has been detained in accordance with subsection 5 of section 219.026 shall be transported or detained in association with criminals or vicious and dissolute persons.”

Further support is found in the statutory procedure specified in the Juvenile Code to waive the jurisdiction of the juvenile court and transfer the matter to a court of general jurisdiction for prosecution under the criminal statutes applicable to adults. Section 211.071.6 R.S.Mo requires the court to find “whether the child is a proper subject to be dealt with under the

provisions of this chapter and whether there are reasonable prospects of rehabilitation within the juvenile justice system...” using the criteria defined by statute. These include consideration of the nature of the offense (1), (2) and (3), the juvenile’s history with the juvenile court (4) and (5), the level of sophistication and maturity of the juvenile including his age (6) and (7), the treatment and programs available to the juvenile court and whether or not the juvenile will benefit from those programs (8) and (9) and racial disparity (10). The entire purpose is to see whether or not the juvenile can be treated and rehabilitated by the juvenile court. If not, the legislature has determined that the retributive and deterrent purposes of the adult criminal justice system are more appropriate and the juvenile may be tried as an adult with the same constitutional rights and privileges afforded criminal defendants.

Pronouncements of State Courts regarding the interpretation of its own laws should also be considered. “It should also be remembered that proceedings under the juvenile code are civil, not criminal. Thus, the emphasis of the juvenile code is on continuing care, protection and rehabilitation of the juvenile.” *H. v. Juvenile Court of St. Louis County*, 508 S.W.2d 497, 500 (Mo., 1974) Commitment to DYS has been found to be a civil, not criminal, sanction based upon the purpose, activities and

programs that DYS provides. The Western District Court of Appeals found that the goal of DYS is to:

“...educate him, train him to be self-sufficient, condition him to avoid the scourge of drug and alcohol abuse, prepare him (and his family) for his return, and alter his aberrant behavior toward children.

That has likewise been the goal of the juvenile court. Inasmuch as Appellant was fifteen when he violated § 566.067 (the conduct on which the juvenile court based its jurisdiction), the court could have dismissed the juvenile petition and transferred Appellant to the circuit court for prosecution under the general law. § 211.071.1. The purpose of such a transfer is to protect the public in those cases where rehabilitation of the juvenile appears impossible. *State ex rel. Arbeiter v. Reagan*, 427 S.W.2d 371, 377[4] (Mo. banc 1968). Instead, the juvenile court committed Appellant to DYS, obviously making rehabilitation, not incarceration, the objective.

Placing Appellant with DYS for that purpose was an appropriate exercise of the state's *parens patriae* authority,

designed to benefit both Appellant and society by exorcising Appellant's predilection for sexual contact with children and enabling him to become a self-sufficient adult.

This court recognizes that as a juvenile advances toward adulthood, the state's *parens patriae* interest diminishes. This court does not imply the state's *parens patriae* interest alone enables the state to keep Appellant with DYS until age twenty-one. The relevance of the *parens patriae* discussion in this opinion is that it demonstrates Appellant's commitment to DYS at age sixteen for education, treatment and rehabilitation was civil, not criminal, in nature. The juvenile court's decision to keep Appellant with DYS after age eighteen for the same purposes was analogous to the action of the Illinois authorities in *Allen*, 478 U.S. 364, 92 L. Ed. 2d 296, 106 S. Ct. 2988, where the involuntary commitment of a sexually dangerous person for treatment and rehabilitation was held not to be a criminal proceeding.

This court holds Appellant's commitment to DYS was civil, not criminal, in nature..." *In the Interest of RLC*, 967 S.W.2d 674, 677 (Mo. Ct. App. 1998)

Under the *Ward* test, it is clear that the legislature intended the Juvenile Code, including commitment to DYS, to be statutory civil proceedings, the State Courts have interpreted these laws as civil and the entire statutory scheme is not "...so punitive either in purpose or effect as to negate that intention." The next consideration is the purpose of the Sixth Amendment and its utility in juvenile delinquency proceedings.

III. The *Crawford* rule should not be applied to statutorily civil juvenile delinquency proceedings in that it is not required and the statutory procedures which permit the admissibility of the type of evidence suppressed in this case are sufficient to insure reliability in a judge tried case.

It is important to note what Appellant is **not** requesting. Appellant is not suggesting a complete removal of all protection that juveniles are statutorily afforded in delinquency proceedings. In Missouri, by both statute and rule, juveniles receive a plethora of due process rights and privileges, some of which exceed those of adults charged with crimes. Detained

juveniles must be housed in detention facilities that are segregated from adults. Section 211.063 R.S. Mo, Section 211.151 R.S. Mo, Rule 111.03(c). A juvenile must be released from detention within twenty four hours of being arrested unless a judge determines the necessity of continued detention. A detained juvenile has a right to a detention hearing within three business days of being taken into custody. Section 211.061 R.S. Mo. The juvenile and their custodian have statutory rights to counsel. Section 211.211 R.S. Mo, Rule 116.01. The standard and burden of proof are identical to those in criminal proceedings. No juvenile charged with a delinquent offense may be compelled to testify against himself. The rights given to a juvenile prior to custodial interrogation exceed those of adults charged with the same offense. Juveniles have a right to have a responsible adult advise them during any such questioning, a right unavailable to a criminal defendant. Section 211.059.1(3), Rule 122.05. Juveniles who are not accused of law violations (i.e. Status Offenders) may not remain in secure detention unless certain findings are made. Section 211.063.1(1-3) RSMo. The juvenile has a right to a trial. Section 211.171 R.S. Mo, Rule 119.02(5) Illegally obtained evidence may be suppressed in the same manner as criminal proceedings. *Cf.* Section 211.261.2 R.S. Mo. No juvenile may be sentenced and confined in the Department of Corrections unless the juvenile court has dismissed the

petition to allow prosecution under the general law, a process that requires significant findings prior to its execution. *Cf.* Section 211.071.6 RSMo.

None of these rights or privileges is at issue here. Appellant does not maintain that the fact that delinquency proceedings are statutory civil proceedings necessarily negates the wisdom or effectiveness of providing these safeguards. What Appellant does submit is that *Crawford* rule's singular method of determining reliability (i.e. "that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford* at 61, *supra.*) inappropriately limits the ability of a juvenile court judge to admit evidence that is permitted by existing statutory procedures in circumstances and conditions such as were presented in the trial below.

The purpose of the Sixth Amendment "is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee." *Id.* Even the *Crawford* Court recognized that "Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable" *Id at 63.* It is only in the case of **criminal** trials that "The Constitution prescribes a [specific] procedure for determining the reliability of testimony..." *Id at 67.*

As has been previously demonstrated, delinquency proceedings under the Juvenile Code are statutory civil proceedings and as such, the *Crawford*

rule does not apply. The Missouri Legislature has established procedures and methods that a Court can utilize to determine whether the out of court statements of a child victim are sufficiently reliable and thus should be admissible as substantive evidence. *Cf.* Section 491.075 RSMo; The Child Victim Witness Protection Law, Section 491.675 *et seq.*; Section 492.304 RSMo. All of these procedures are limited to those cases involving acts which would be criminal offenses under Chapters 565, 566 or 568. This is a specific legislative recognition that children who are victimized by these types of acts require specialized procedures that balance the truth seeking function of a court with protection of the rights of those accused of committing such acts. Additionally, a juvenile judge sits in a unique position. Their primary consideration is for the best interests of the juvenile that comes before the court. They also function as both finder of fact and arbiter of law. Where a balance must be made, a juvenile court judge by training, experience and position can achieve this balance but only if allowed the necessary flexibility to do so.

The disregard of the *Crawford* Court of these carefully considered evidentiary procedures enacted by numerous state legislative bodies over decades should be limited to criminal proceedings where the purpose is punitive. It should not be applied to rehabilitation and treatment of children.

The fact is that application of the Crawford rule will remove necessary reasonable discretion from the juvenile courts as to the admissibility of evidence in these court-tried delinquency cases. This will force upon the juvenile courts an inflexible rule that robs the juvenile court of the ability to balance the rights of a juvenile perpetrator against the rights of a juvenile victim. Such inflexibility goes against the entire purpose of the Juvenile Code in Missouri. A juvenile court should be able to hear evidence and make a determination as to its sufficiency without an artificially imposed and undefined distinction of whether the evidence is “testimonial” vs. “non-testimonial”. The imposition of the new Crawford Rule would severely limit the ability of the juvenile court to effectively and appropriately administer treatment to a juvenile who has a problem that needs to be addressed.

Additionally, “since the rules of exclusion in the law of evidence as applied in a court of law are largely as a result of the jury system, the purpose of which is to keep from the jury all irrelevant and collateral matters which might tend to confuse them or mislead them from a consideration of the real question involved, when an action is to the court sitting without a jury, the rules of exclusion are less strictly enforced” In Interest of C.K.G., 827 S.W.2d 760, 767 (Mo. Ct. App., 1992).

Given the unique mission and purpose of the Juvenile Code in treating and rehabilitating juveniles who commit those acts defined under Chapters 565, 566 or 568, the statutory procedures enacted in Missouri and the role of the judge in a judge-tried case, it is respectfully submitted that application of the **Crawford** rule is unnecessary and actually impedes the function of the juvenile court in reaching the truth so as to provide those juveniles who need its assistance with the appropriate help they need.

In this case, the child victim was sworn and took the stand. She was able to answer some questions but not all. In other words, the victim testified. Section 492.304 RSMo allows the admission into evidence of this type of video and audio recordings. Applying all of the applicable factors enumerated in that statute, the video qualified for admission under Section 492.304 RSMo.

Even if it is determined that the juvenile victim did not “testify” because she was unable to answer some questions, the video qualifies for admission under Section 491.075 RSMo.

The victim clearly suffered from significant emotional trauma which made her unavailable despite the efforts made to have her testify. The fact that the conditions set forth in Section 492.304 have been met is sufficient “indicia of reliability” for admission under Section 491.075 RSMo. It is

respectfully suggested that the use of the current statutes and procedures in juvenile delinquency proceedings is allowed and that the Court erred in suppressing the videotape as the Crawford rule has no applicability in juvenile delinquency proceedings.

IV. Assuming *arguendo* that the right to confrontation was violated, the trial court erred in suppressing the video as unconstitutional in that other remedies were available that would avoid a constitutional challenge.

Without conceding that the Crawford rule is applicable to juvenile delinquency proceedings, assume *arguendo* that it is applicable in the instant case.

Even based upon such assumption, it is respectfully submitted that there are other remedies available that fail to raise constitutional issues.

First, the trial court could have found the video to be part of the business records of the Child Advocacy Center in Wentzville. *Cf.* Section 490.680 R.S.Mo. Business records were clearly excepted in Crawford as non-testimonial.

Second, the statements made on the video were for the purpose of diagnosis and treatment. This is a well established hearsay exception. *Cf.* Breeding v. Dodson Trailer Repair, Inc., 679 S.W.2d 281, 284 (Mo. 1984).

The Child Advocacy Center provides medical and psychological examination and treatment to child victims of physical and/or sexual abuse. They also make referrals to outside agencies for these services. The video of the forensic interview is only a single, albeit vital, part of the entire range of services provided by the Child Advocacy Center that is necessary to assess the nature and extent of any injury, physical or psychological.

It is respectfully suggested that the trial court erred in suppressing the evidence where additional grounds for admission were available.

V. The trial court erred in suppressing the videotape in its Findings and Recommendations Denying Jurisdiction after admitting it into evidence at trial as such a procedure deprives Appellant of a full and fair hearing.

The trial court admitted the videotape into evidence after the juvenile's attorney raised objection. (TR 15). The objection offered by the juvenile's attorney was well stated (TR 12-13) and squarely placed before the trial Court the issue to be decided: Does the US Supreme Court's ruling in the Crawford case prevent the admission into evidence of the out of court statement of the child victim in this case under these specific circumstances? The trial court clearly considered the objection and overruled it.

“MR. SMITH: Your Honor, at this time I'd submit Juvenile Office Exhibit No. 1.

MR. SCHROEDER: And, Your Honor, my objection is the same as I've stated previously.

COMMISSIONER SWANN: I understand that. I'm going to overrule the objection. **I will receive this into evidence. ...**" (TR 15, lines 15-21)

The Court went on to say "Since it is a Court-tried case, I'll be writing findings including the findings concerning the case that you've cited today, and I will take that into consideration in my ruling." (TR 15, lines 21-25).

The purpose of an objection is to "call the court's attention to improper evidence or procedure" **Black's Law Dictionary Abridged Fifth Edition**, pg 556 (West Publishing Company, 1983). The purpose of calling the Court's attention to improper evidence or procedure is two-fold.

First, it allows the Court to consider questions of admissibility and competency prior to the receipt into the record of facts that will be relied upon to make the legal adjudication of issues before the court.

Second, by giving the Court the opportunity to make such a decision prior to admission, once the decision is made, all parties to the adjudicatory process will be equally aware of the items in the record that the Court will use in making its adjudication. This is important since if the Court does not allow certain evidence to be admitted, the proponent of the evidence may seek alternative ways to have the evidentiary facts placed before the Court, ex. attempting to lay a proper foundation where an improper foundation objection is sustained. Conversely, if the Court rules that specific evidence is

admissible after a specific objection is raised, both parties should be able to reasonably rely upon the Court's ruling as final and assume that such evidence will be used by the Court in reaching its decision.¹

Here the evidence was admitted after specific objection was made and overruled. After the close of the evidence and submission of the case, the same evidence was then un-admitted, excluded or suppressed based upon the same objection that was previously overruled, without giving Appellant an opportunity to cure the defect. This procedure produces such uncertainty that a proponent of evidence will never know what record, if any, has been established and what facts, if any, will be relied upon by the Court in making its adjudication of the facts of the petition.

Under the specific facts of this case, a child victim was called to testify and did in fact begin her testimony. All parties, as well as the court, were acting under the assumption that the child victim would in fact complete her testimony and then be available for cross-examination.

Due to emotional trauma, this particular child victim was unable to proceed with direct examination and was subsequently unable to be cross-examined. Had the child victim been able to proceed and was available for cross-examination, this issue would not have arisen as the *Crawford* rule does not apply in circumstances where the declarant of the out-of-court statement offered is available for cross-examination. Had the court

¹ This argument merely goes to the admissibility or competency of the evidence not its weight or persuasiveness.

suppressed the evidence or refused admission during trial, then Appellant could have done several things.

He could have asked for an adjournment to give the child victim time to compose herself and attempt to continue with her testimony.

He could have asked for a continuance to another date and time for the same purpose.

He could have asked for an *in camera* interview by the court with procedures to allow questions to be posed by defense counsel.

A deposition might have been arranged.

These are only a few of the options that might have been utilized to avoid the current issue. It is respectfully suggested that the trial court erred in admitting then suppressing the evidence in the manner in which it did.

CONCLUSION

We are now encountering the opposite end of the swing of the pendulum whereby the application of criminal concepts is endangering the basic core concepts of the juvenile justice system. “If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (U.S. 1971). It is respectfully suggested that there has to be a substantial difference between criminal and juvenile

proceedings and that imposition of the Crawford rule to juvenile proceedings eliminates that difference.

Today, this Court is faced with the prohibition of the exercise of any judicial discretion in the admission of relevant, material and probative and previously competent evidence despite decade's long established procedural and substantive due process safeguards. Appellant is not arguing that the Court disregard the Supreme Court's Crawford decision but respectfully requests that this Court acknowledge the difference between juvenile and criminal cases and hold that it is a distinction with a difference. It is respectfully suggested that the Crawford rule does not apply to juvenile delinquent proceedings in Missouri and that the trial court erred in so holding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John J. Smith, certify that the above was served on Susan Block, Attorney for the juvenile, 6TH Floor, 165 North Meramec Avenue, Saint Louis MO 63105 and Timothy C. Mooney, Jr., Attorney for Justice for Children, One Metropolitan Square, Suite 3600, Saint Louis MO 63102 on January 6, 2006 by ordinary mail.

John J. Smith #40977

CERTIFICATION PURSUANT TO RULE 84.06(C)

I, John J. Smith, Legal Counsel for the Juvenile Officer of Saint Charles County do hereby certify that this brief complies with Rule 84.06 of the Rule of Civil Procedure and that this brief contains 7297 words. I further certify that a floppy disk containing this brief in Microsoft Word XP format was served along with this brief and that said floppy disk was virus scanned using eTrust InoculateIT version 7.1.501 and was reported by said program to be virus free.

Dated: December 15, 2005

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